CALTEX OIL MALAYSIA LTD A

v.

SURIA MURNI (SELANGOR) SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR B
HANIPAH FARIKULLAH JC
[SUIT NOS: D11-22-561-2006 & D4-22-353-2005]
6 SEPTEMBER 2010

CONTRACT: *Breach - Agreement - Agreement for sale of diesel - Sale of diesel by plaintiff to defendant for commercial inland use - Diesel used by defendant for bunkering purposes causing plaintiff to lose government subsidy - Whether there was a breach of the agreement* C

CONTRACT: *Damages - Remoteness - Whether loss fell within ambit of s. 74 Contracts Act - Commercial inland use diesel used by defendant for bunkering purposes causing plaintiff to lose government subsidy - Whether loss naturally arose from defendant's breach - Whether at the time contract was made defendant knew of possible loss that will arise due to his breach - Damages for loss of subsidy allowed* D

E

CONTRACT: *Estoppel - Estoppel by conduct - Typographical error in delivery order - Error rectified by plaintiff through letter sent to defendant - Letter not replied to by defendant - Whether defendant now estopped from denying typographical error and relying on erroneous statement in delivery order* F

CONTRACT: *Terms - Implied terms - Terms implied from contents of purchase orders, delivery orders and invoices - Implied term in sale of diesel by plaintiff to defendant that plaintiff would be able to claim reimbursement of government subsidy* G

The price of diesel in Malaysia depends upon the end-user concerned, namely: inland use, retail inland use, commercial inland use, for use by National Fishermen's Association ('NEKMAT'), foreign bunkering and bunkering. Oil companies (including the plaintiff) can claim for reimbursement of the subsidy in respect of diesel sold for commercial inland use. The plaintiff sold 2,169,360 litres of diesel to the defendant through the defendant's Commercial Inland Account maintained with the plaintiff. At all material times the defendant had three (3) separate accounts with the plaintiff H

I

consisting of: Commercial Inland Account, Bunkering account and Foreign bunkering account. According to the plaintiff, it was a term of the sales of the diesel that the diesel would be utilised solely for commercial inland use and that the plaintiff would be able to claim the subsidy payable for commercial inland use diesel sales from the Government. The Customs Department later rejected a portion of the plaintiff's claim amounting to RM665,797.28 on the ground that a portion of the diesel purchased by the defendant was used for bunkering purposes. Hence, the plaintiff alleged that the defendant breached the terms of the sales, namely that the diesel would be utilised solely for commercial inland use. The plaintiff claimed against the defendant for lost of reimbursement of diesel subsidy of RM609,520.20 from the Customs Department as a result of the breach. The defendant disputed this. The issues arising for determination were, *inter alia*: (i) whether the sale of diesel to the defendant was for inland commercial use; (ii) whether the delivery orders and invoices were for bunkering; (iii) whether both parties had agreed that the plaintiff would be entitled to claim reimbursement of subsidy from the sale of diesel; and (iv) whether the defendant had breached the terms of the contract.

Held (allowing the plaintiff's claim with costs):

(1) Since the prices written in the purchase orders were the price of diesel for commercial inland use, it was an implied term that the diesel in the purchase orders would be purchased for commercial inland use. The word "INLAND A/C" confirmed that the diesel was sold to the defendant for purposes of commercial inland use. (paras 42 & 44)

(2) The words "DUTY-PAID BUNKERING" appearing on the invoices and delivery orders did not show that the diesel was agreed to be sold for bunkering because these words were typographical errors by the plaintiff. This typographical error had been rectified by the plaintiff *vide* its letter to the defendant, to which the defendant had not replied to. Therefore, the defendant was estopped from denying that: (i) the words "Duty-Paid Bunkering" in "DELIVERED TO" were typographical error; (ii) the correct words should be "Inland Account-ex Pulau Indah"; (iii) the sale was strictly for commercial inland use; and (iv) the sale was billed to the Commercial Inland Account. (paras 45, 46, 47, 49)

(3) In light of the totality of the evidence adduced, the parties had agreed that the diesel sold by the plaintiff to the defendant was for commercial inland use. It was completely illogical for the plaintiff to agree to sell the diesel to the defendant for bunkering at the price of commercial inland use (which is lower than for bunkering) since this kind sale would clearly result in the loss of reimbursement of subsidy from the Government. (paras 55, 56)

(4) The defendant had experience in the business of buying diesels and the defendant had actively bought diesel from the plaintiff since January 1999 (one year and one month) before the material date. As such, it was highly unlikely that the defendant did not know about the existence of the subsidy scheme introduced by the Government at the end of 1999 since any significant changes in the oil market like in this instant case would certainly be known by the players in the industry, including the defendant. Therefore, it was an implied term of the sale of diesel to the defendant that the plaintiff would be able to claim reimbursement of subsidy. (paras 64, 65 & 66)

(5) The evidence showed that the sale during the material time period was agreed to be for commercial inland use. By using the said diesel for bunkering, the defendant had breached its contract with the plaintiff and the plaintiff was entitled to claim damages for any losses which arose in the usual course of things. (para 72)

(6) The loss of reimbursement of subsidy suffered by the plaintiff was clearly within the ambit of s. 74 of the Contracts Act, 1950 because such loss naturally arose from the defendant's breach of the terms of the contract since the defendant had used the diesel for bunkering which precluded the plaintiff from getting the subsidy from the government or when the contract was made, the defendant knew it was for the purchase of diesel for commercial inland use, which is subsidized by the Government. Therefore, the plaintiff could claim the sum of RM609,950.20 from the defendant. (para 74)

Case(s) referred to:

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA ***(refd)***

Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits [2001] 8 CLJ 262 HC

Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd [2006] 5 CLJ 307 HC

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC

Wong Swee Chin v. PP [1980] 1 LNS 138 FC

Legislation referred to:

Contracts Act 1950, s. 74

For the plaintiff - Arham Rahimy Hariri (T Tharumarajah with him); M/s Azim, Tunku Farik & Wong

For the defendant - Maniam Kuppusamy; M/s Skrine

Reported by Amutha Suppayah

JUDGMENT

Hanipah Farikullah JC:

[1] The plaintiff, Caltex Oil Malaysia Limited claims against the defendant, Suria Murni (Selangor) Sdn Bhd for loss of reimbursement of diesel subsidy of RM609,520.20 from the Royal Customs and Excise Department (Customs Department) as a result of breach of contract by the defendant that the diesel purchased by the defendant is solely for inland commercial use and not for bunkering. The defendant disputes the plaintiff's claim.

Background Facts

[2] It is the policy of the Government of Malaysia *vide* the Control of Supplies Act 1961 to control the price of diesel in this country. The price of diesel for "inland use" (that is to ordinary local consumers) in this country is controlled irrespective of the prevailing posted market price for diesel.

[3] It is an agreed fact that to facilitate its policy to control the price of diesel, the Government has put in place a pricing formula termed as the 'Automatic Pricing Mechanism' ("APM"). The APM provides *inter alia*, for an equation to determine the posted pump price for a particular month by utilising the average of the lowest Singapore diesel price posted by the six major oil companies (Shell, Esso, BP, Mobil, Caltex & Singapore Petroleum Company) two (2) months' prior to that month. Having derived this figure, the Government then varies the chargeable duty on the diesel thus controlling the price of diesel for "inland use".

[4] The price of diesel in Malaysia depends upon the end-user concerned, namely:

(i) Ordinary consumers ("inland use") which consists of:

(a) "retail inland use", that is diesel purchased by retail consumers from petrol stations which diesel must be pumped directly into the fuel tanks of vehicles; and

(b) "commercial inland use", that is the diesel sold by oil companies directly to commercial end-users or through distributors the defendant being such a distributor;

(ii) The National Fishermen's Association of Malaysia ("Nekmat");

(iii) Bunkering for any ships with a next port of call outside Malaysia ("foreign bunkering"); and

(iv) Bunkering for ships other than those specified in para. 4 (iii) ("bunkering").

[5] *Vide* a letter dated 2 November 1999 to six major oil companies, the Government informed that the APM only applies to diesel sold for "inland use" and to NEKMAT and not for bunkering of the purpose.

[6] It is an undisputed fact that in order to claim for the reimbursement of the subsidy, the oil companies (including the plaintiff) would on a monthly basis lodge a claim with the Customs Department by completing a form titled "Statement of Claim for Subsidy Payments on Diesel" in respect of the diesel sold by that oil company for commercial inland use in that particular month. The Customs Department would then process the claim and upon ascertaining that the claim is related to diesel sold for "commercial inland use", reimburse the subsidy to the oil company in question.

A **The Plaintiff's Case**

[7] In February, March and April 2000, the plaintiff sold 2,169,360 litres of diesel to the plaintiff through the defendant's Commercial Inland Account maintained with the plaintiff.

B **[8]** At all material times and in order to facilitate the defendant's purchase of diesel from the plaintiff, the defendant had three (3) separate accounts with the plaintiff consisting of:

(i) An account for the purchase of diesel for commercial inland use
C bearing account number SAP 161352957 ("Commercial Inland Account");

(ii) An account for the purchase of diesel for bunkering bearing account number SAP 161352627; and

D (iii) An account for the purchase of diesel for foreign bunkering bearing account number SAP 161352612.

[9] According to PW4, it was a term of each of the sales purchase of the diesel by the defendant through its Commercial
E Inland Use Account that:

(i) The diesel would be utilised whether by the defendant or otherwise solely for "commercial inland use"; and

F (ii) The plaintiff would be able to claim the subsidy payable for "commercial inland use" diesel sales from the Government of Malaysia.

[10] It is the plaintiff's case that in regards to the oral agreement, the terms were agreed to in telephone conversations between PW4
G or PW5 with DW1 and or DW2 acting for and on behalf of the defendant prior to each and every purchase whereby the defendant asked for and was quoted the commercial inland rate for diesel offered by the plaintiff on that particular day.

H **[11]** The plaintiff contends that in so far the agreement was made in writing, the agreement was contained in or is to be inferred from the following documents or some or one of them:

(i) the purchase orders evidencing the sales of the diesel;

I (ii) the delivery orders in respect of the diesel; and

(iii) the invoices and receipts in relation to the diesel;

all of which *inter alia*, reflect the commercial inland use rate.

[12] The plaintiff's second witness Perumal a/l Munusamy (PW2) Head of Internal Tax Division, Ministry of Finance at the material time testified that *vide* its letter dated 19 April 2005, the Customs Department have rejected a portion of the plaintiff's claim amounting to RM665,797.28. The rejection by the Customs Department was premised on the ground that a portion of the diesel purchased by the defendant from the plaintiff was in fact utilised for "bunkering" purposes.

[13] Hence, the plaintiff alleged that the defendant has breached the terms of the sales, namely that the diesel would be utilised solely for "commercial inland use".

The Defendant's Case

[14] The defendant's business includes *inter alia*, diesel transactions. The defendant obtains diesel from oil companies including the plaintiff. The diesel purchased by the defendant from the plaintiff will be sold to third parties.

[15] DW1 and DW3 testified that all of the defendant's purchase orders, the plaintiff's notice of delivery and invoices it showed that the diesel was purchased for the purpose of bunkering.

[16] DW1 and DW3 also informed the court that the defendant has only one account with the plaintiff for Klang Valley Area, ie, account number: 161352957. All the purchase orders issued by the defendant were from this account and were meant for the purchase at Klang Valley.

[17] The defendant avers that it was not informed by the plaintiff of the Government's policy. According to DW1, the plaintiff itself has no formal training and has no formal information of the APM.

[18] It is the defendant's case that the defendant as the trader will sell the diesel to a third party after taking into account of the transportation, handling and port charges and adding the profit margin required by the defendant.

[19] In regards to the subsidy scheme introduced by the Government, the defendant avers that if the defendant had the knowledge that the supply of diesel offered by the supplier is being subsidized by the Government, the defendant will certainly take into account the subsidy and sells the diesel at a higher price.

A **Preliminary**

[20] The plaintiff's claim in Suit No. D4-22-353-2005 ("D4 Suit") is in respect of the diesel transactions in February, March and April 2000. The plaintiff's claim in Suit No. D7-22-561-2006 ("D7 Suit")
B is in respect of the diesel transaction in May 2000.

[21] Although both suits have been consolidated earlier by an order of the court, both parties have agreed that only D4 Suit will be tried and the decision of this suit will bind D7 Suit.

C **Issues**

[22] Based on the facts of the case and the evidence adduced, the issues to be determined by the court are as follows:

D (i) Whether the sale of diesel to the defendant is for the purpose of inland commercial use.

(ii) Whether the defendant had three (3) separate accounts with the plaintiff.

E (iii) Whether the delivery orders and invoices in C2 and C3 were for bunkering.

(iv) Whether both parties expressly and/or impliedly agreed that the plaintiff would be entitled to claim reimbursement of subsidy from the sale of diesel.
F

(v) Whether the defendant has breached the terms of the contract.

[23] In coming to a decision in this case, I have carefully considered the evidence adduced by the plaintiff and the defendant
G including the many volumes of documents relied on by the parties. I have also had the advantage of reading the submissions and authorities submitted to court.

Whether The Sale Of Diesel Is For The Purpose Of Inland
H **Commercial Use**

[24] The basic facts as to the sale of diesel to the defendant are by and large undisputed by the defendant. P3 and PW4 in their evidence confirmed as follows:

I (i) In February 2000, the defendant purchased from the plaintiff 72,900 litres of diesel;

(ii) In March 2000, the defendant purchased from the plaintiff 361,360 litres of diesel;

(iii) In April 2000, the defendant purchased from the plaintiff 21,169,360 litres of diesel; and

(iv) These purchases are shown by the purchase orders, delivery orders and invoices in bundle C2 and C3.

[25] Since the above evidence was never challenged during cross-examination, the existence of a contract has been admitted by the defendant. In *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138, the Federal Court held that:

> On this point we need to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to acceptance of the witness's testimony.

[26] Having decided that there is a contract between the plaintiff and the defendant, the next issue to be determined is the terms and conditions of the contract.

[27] The plaintiff contends that it is the express terms and/or implied terms of the contract that both parties agreed that diesel sold was for the purposes of commercial inland use and the plaintiff would be able to claim for reimbursement of subsidy from the sales of this diesel.

[28] In response, the defendant avers that the plaintiff was aware that at all material times that the defendant purchases diesel from the plaintiff for the sole purpose of bunkering. According to the defendant, this was made clear in the purchase orders, delivery orders and invoices issued. The court finds that whether the diesel was sold to the defendant for the purpose of commercial inland use instead of bunkering would form a major factor in the determination of this case.

[29] PW4 said that prior to each and every purchase orders, DW1 and DW3 would call either him or PW5. According to PW4, DW3 would ask for the price of diesel for commercial inland use for the day or the next day. DW3 confirmed in cross-examination that she had prepared and sent to the plaintiff purchase orders in C2 and C3 for the period from February to April 2000 after the plaintiff through PW4 gave her the price of diesel and she agreed with the

price. She also confirmed in cross-examination that before she prepares the purchase orders, she will get the quotation of the price through telephone conversation with PW4.

[30] In regards to the price quoted on the purchase orders, PW4 and PW5 testified that the price given to DW3 was the price of diesel for commercial inland use. Further, PW4 and PW5 confirmed that the prices in all the purchase orders in C2 and C3 reflected the price of diesel for commercial in land use during February to April 2000.

[31] On this issue, DW3 in cross-examination admitted that the price quoted by the plaintiff was the price of diesel for commercial inland use for the day or of the next day.

[32] In the light of the evidence adduced and the documentary evidence tendered to the court, the court finds that the price quoted on the purchase orders relates to the price of diesel for commercial inland use.

Whether The Defendant Has Three (3) Accounts With The Plaintiff

[33] The next issue that arises is whether Account No. 161352957 (Account No. 957) on the purchase orders is the defendant's account with the plaintiff for commercial inland use.

[34] The plaintiff contends that in February, March and April 2000, the defendant has placed orders *vide* these purchase orders under its commercial inland account with the plaintiff, which is Account No. SAP 16135295 (Account No. 957).

[35] It is the plaintiff's case that Account No. 957 is the defendant's account with the plaintiff for commercial inland use. The plaintiff submits that at all material times, the defendant had three (3) accounts with the plaintiff for purposes of buying diesel. To support the plaintiff's contention, learned counsel for the plaintiff based his submission on the following grounds:

(i) Account No. SAP 161352612 is for foreign bunkering ("Account No. 612");

(ii) Account No. SAP 161352627 is for local bunkering; and

(iii) Account No. 957.

[36] On this issue, DW1 and DW3 denied that the defendant had three (3) accounts with the plaintiff. However in cross-examination, DW3 agreed that the defendant had ordered diesel from the plaintiff under Account No. 957.

[37] I have carefully perused the notes of proceedings, and find that the evidence adduced by the parties respectively pertaining to the existence of Account 957 is sharply conflicting. Faced with such a conflict of oral testimonies of the means to determine its accuracy is by referring to and relying on contemporaneous documents and evidence of witnesses to draw reasonable inferences. This approach is adopted by the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119 where Justice Chang Min Tat (as he then was) said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[38] The above approach was also applied by James Foong J (as he then was) in *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262 and Low Hop Bing J (as he then was) in the case of *Nuri Asia Sdn Bhd v. Fosis Corporation Sdn Bhd* [2006] 5 CLJ 307.

[39] In the light of two disparate versions that have been given by the parties, the court turns to the purchase orders, delivery orders and invoices (in bundle C) that were issued before the material time. In this regards, the court agreed with the submission of learned counsel for the plaintiff that the defendant know about Account No. 957 and other account based on the following reasons:

(i) All the transactions in January to February and part of March 1999 (all were outside the material time period) were made under Account No. 612 (for bunkering) as shown by the purchase orders, delivery orders and invoices at pp. 633 to 692 of bundle C4. All purchase orders were prepared by DW3.

(ii) From 9 March to 30 March 1999 (all were outside the material time period), the defendant purchased diesel from the plaintiff using Account No. 957 (for commercial inland use).

[40] As such, the court is not accepting DW1 and DW3's evidence that the defendant only has one (1) account with the plaintiff since it is inconsistent with the contemporaneous documents ie, the purchase orders (all prepared by DW3), the invoices and the delivery orders which shows that the defendant knows that it has more than one account with the plaintiff.

[41] In *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759 the Court of Appeal held:

> On the facts, the trial judge had approached the question of appointment by preferring the contemporaneous documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant on oath. The Court of Appeal was of the view that the trial judge was extremely fair in her treatment of the appellant as a witness. Having carefully studied his oral evidence and having compared it with the contemporaneous documents, the Court of Appeal had no doubt that any reasonable tribunal similarly circumstanced as the trial judge in the instant case would have concluded that the appellant was not a truthful witness.

[42] Having decided earlier that the prices written by DW3 in these purchase orders were the price of diesel for commercial inland use in February, March and April 2000, I am of the view that it is an implied term that the diesel in the purchase orders would be purchased for commercial inland use.

Whether The Delivery Orders And Invoices In C2 And C3 Were For Bunkering

[43] The court notes that the delivery orders and invoices in C2 and C3 in the column "SOLD TO" states as follows:

SOLD TO

Dijual kepada

161352957
SURIA MURNI (SRL) S/B INLAND A/C
LOT 7270 1 ½ MILES
JALAN SUNGAI BERTIK
OFF JALAN TELOK
GADONG
41100

(emphasis added)

[44] Earlier, the court finds that "161352957" is Account No. 957, which is the defendant's account for commercial inland use. The word "INLAND A/C" above confirms that the diesel was sold to the defendant for purposes of commercial inland use. In fact, the court notes that in cross-examination DW1 agreed that this column "SOLD TO" shows that the diesel had been sold to the defendant's commercial inland account.

[45] On this issue, PW4 and PW5 clarified that the words "DUTY-PAID BUNKERING" appearing on the invoices and delivery orders in C2 and C3 does not show that the diesel was agreed to be sold for bunkering because these words are typographical error by the plaintiff.

[46] The court notes that this typographical error had been rectified by the plaintiff *vide* its letter dated 15 August 2000 to the defendant on p. 63 of C1 which reads:

> By Mail & Fax : 33728094
>
> Date: 15-8-2000 CALTEX
>
> Mr Hean Keng Hock,
> Managing Director
> Suria Murni (Selangor) Sdn Bhd
> Lot 7270 1 ½ Miles
> Jalan Sungai Bertik
> Off Jalan Telok Gadong By Hand
> 41100 Klang, Selangor
>
> Dear Sirs,
>
> **Correction Of Typographical Error On Delivery Orders For Inland Diesel Account No: 16132957**
>
> **Period 1st March 1999 To 23rd May 2000**
>
> Kindly be informed that we have found a typographical error in our Delivery Orders ("Dos") for the sales of diesel to you in respect of the above period for your Inland Account No. 161352957.
>
> The Dos erroneously stated in the "Delivered To" box "Duty-paid Bunkering" instead of Inland Account-ex. Pulau Indah" **as the sales to you under the Dos were strictly for inland usage only and bill to your Inland Account No. 161352957 As Advised By You.** We have since corrected the error in May 2000.

A We regret any inconvenience caused to you and wish to inform you as a matter of record.

Yours truly.

Sgd.
B ...
Simon Chin Lee Sen
Commercial Manager
Cls/email

(emphasis added)
C

[47] DW1 admitted in cross-examination receiving this letter and agreed that there was no reply to this letter by the defendant. Thus, the court finds that since there was no reply by the defendant to the plaintiff's letter dated 15 August 2000, the defendant had clearly
D agreed to the contents of the said letter.

[48] In *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155 (Tab B of PBA) at p. 159, the Court of Appeal held that:

> On 17th December 1991, the respondent wrote to the appellant
E confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay additional fee. In
F respect of this sum, the learned judge granted leave to defend. We would digress for a moment to say a few words about the latter order of the learned judge.
>
> > During argument, we registered our surprise at the learned judge's reluctance to enter judgement for this sum of
> G RM100,000.00. After all, the appellant had failed to respond to the letter of 17 December 1991. If there had never been an agreement as alleged, it is reasonable to expect prompt and vigorous denial. But, as we pointed out, there was no response whatsoever from the appellant.
> >
> H In this context, we recall to mind the following passage in the judgement of Edgar Joseph Jr J in *Tan Cheng Hock v. Chan Thean Soo* [1987] 2 MLJ 479 at p 487:
> >
> > > In *Wiedman v. Walpole* [1891] 2 QB 534 at p 537, an
> > I action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she

> stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.
>
> Lord Esher MR, in his judgment, remarked, 'Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise'. (emphasis added). Earlier, in his judgment, he said, 'Now there are cases – business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to certain things, the person who receives the letter must answer it if he means to dispute the fact that he did so agree'. (emphasis added).

[49] In my judgment, by choosing not to reply to the plaintiff's letter 15 August 2000, the defendant had represented to the plaintiff that it had agreed to the contents of this letter. Hence, the defendant should be estopped from denying that:

(i) The words "Duty-Paid Bunkering" in "DELIVERED TO" were typographical error;

(ii) The correct words should be "Inland Account-ex Pulau Indah";

(iii) The sale was strictly for inland usage (ie, commercial inland use);

(iv) The sale was billed to the inland account (ie, Commercial Inland Account) Account No. 957 as ADVISED by DW1.

[50] In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 (Tab C of PBA), the Federal Court held that:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v. Alt* 8 Ch. D. 286, 314:
>
> > If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might

A otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

[51] Further, from the evidence adduced, the court finds that both parties agreed that if the diesel would be for bunkering purposes the following procedure will be followed:

B

(i) The defendant must notify the plaintiff the name of the ship;

(ii) The plaintiff would notify the defendant the loading date of the diesel;

C

(iii) The defendant must give the plaintiff customs declaration prior to every purchase.

[52] I have carefully perused the purchase orders in C2 and C3 and with regret the court finds that none of purchase orders contains the name of any ship or the loading date of the diesel.

D

[53] The court also finds that even though the defendant has tendered to the court customs declaration forms in C6, there is not an iota of evidence adduced by the defendant to show that these forms or any other similar forms had been given to the plaintiff prior to the collection of the diesel purchased in February, March and April 2000.

E

[54] On the other hand, PW4 confirmed that the plaintiff did not get these customs declaration forms before the transaction between both parties took place. Since the plaintiff did not get the customs declaration form from the defendant prior to each of the transactions during the material time, the sale could not have been agreed by both parties to be for bunkering.

F

G

[55] In light of the above reasons and on the totality of the evidence adduced, on the balance of probability the court finds that the parties have agreed that the diesel sold by the plaintiff to the defendant in February, March and April 2000 was for commercial inland use.

H

[56] In addition to the above, the court is in agreement with the plaintiff that it is completely illogical for the plaintiff to agree to sell the diesel to the defendant for bunkering at the price of commercial inland use (which is lower than for bunkering) since this kind sale would clearly result in the loss of reimbursement of subsidy from the Government.

I

[57] Having decided that it was a term of the contract that the diesel sold by the plaintiff to the defendant is for commercial inland use, the fact that the defendant, by their own admission conceded that the diesel was used by them for bunkering shows that they have breached the contract of sale of diesel with the plaintiff.

Whether Both Parties Expressly And/Or Impliedly Agreed That The Plaintiff Would Be Entitled To Claim Reimbursement Of Subsidy From The Sale Of Diesel

[58] The plaintiff's first witness, Afiza binti Muhammad (PW1), Ketua Penolong Pengarah, Kementerian Kewangan Malaysia testified that the rates of subsidy provided by the Government for the period between October 1999 and April 2000 for commercial inland use were as follows:

(i)	31 October 1999	:	RM0.0106
(ii)	30 April 1999	:	RM0.0578
(iii)	31 December 1999	:	RM0.0899
(iv)	31 January 2000	:	RM0.1009
(v)	28 February 2000	:	RM0.1341
(vi)	31 March 2000	:	RM0.1592
(vii)	30 April 2000	:	RM0.2545

[59] Further, PW1 explained that as a result of this subsidy scheme, the prices of diesel in this country for commercial inland use is lower than for bunkering.

[60] The main issue that the court has to determine is whether the defendant is aware that the prices for diesel is subsidised by the Government.

[61] Based on the evidence of PW1, PW4 and PW5, the plaintiff has argued that it is the practice from that period of time (ie, from November 1999), that the oil companies would adjust their commercial inland use price, in that the price was net of subsidy and subsequently would claim for reimbursement of subsidy from the Customs Department.

[62] The defendant submits that the plaintiff's claim should be dismissed as the plaintiff has failed to notify the defendant about the subsidy scheme as the circular by the government regarding the subsidy scheme was only distributed to the Oil Companies. (Refer to Ikatan Dokumen Bersama Jilid VI p. 1585). The defendant contends that they were not aware of the subsidised scheme at the time they purchased the diesel between the periods of February 2000 to April 2000. In fact, the defendant submitted that they were only aware about the subsidy scheme through a letter dated 10 August 2000 by another oil company.

[63] On this issue, the court notes that PW4 gave evidence which was corroborated by PW5 that the plaintiff through him had orally informed the DW3 about this subsidy scheme.

[64] From the evidence of DW1, the court finds that the defendant is in the business of purchasing diesel. The defendant would purchase diesel from several oil companies in this country and sell it to customers. The court notes that the defendant has an experience in the business of buying diesels and the defendant had actively bought diesel from the plaintiff since January 1999 (one year and one month) before the material date.

[65] As such, the court is in agreement with learned counsel for the plaintiff that it is highly unlikely that the defendant did not know about the existence of the subsidy scheme introduced by the Government at the end of 1999 since any significant changes in the oil market like in this instant case would certainly be known by the players in the industry, including the defendant.

[66] Based on the above reasons, the court finds that it was an implied term of the sale of diesel to the defendant in February, March and April 2000 that the plaintiff would be able to claim reimbursement of subsidy as a result such which was for purposes of commercial inland use.

[67] Further, the court also agrees with the plaintiff's submission that in any event, it has been part of the custom of the diesel market since 31 October 1999 that for commercial inland use diesel, the sale would be subsided by the Government. Since the contract of sale of diesel for commercial inland use between both parties was made in February, March and April 2000, it is reasonable to imply a term into this contract that such sale would enable the plaintiff to claim reimbursement of subsidy from the Government as the sale was agreed for commercial inland use.

[68] Reference was made to the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 where the Federal Court held at p. 531:

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
>
> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratios decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly it is not dependent on the court having to draw an inference explained above.
>
> The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term.

Whether The Defendant Has Breached The Contract

[69] In view of the above, the question therefore arises whether the defendant has breached the terms of the contract. The court notes that on 2 November 2000 (three (3) months after the plaintiff's letter to the defendant on p. 63 of C1), the plaintiff lodged its claim for reimbursement of subsidy from the Customs Department

in respect of the sale of diesel for commercial inland use to the defendant in February, March and April 2000. (see p. 88 to 93 of C1).

[70] However, *vide* a letter dated 26 May 2001, the Customs Department rejected the plaintiff's claim for reimbursement of subsidy on the ground that the diesel sold in February, March and April 2000 was used for bunkering.

[71] PW2 who was involved in preparing the said Customs Department's letter dated 26 May 2001, explained thoroughly in his evidence in chief that those bunkering transactions were carried out by the defendant by referring to various supporting documents in pp. 4 to 37 of bundle B. According to PW2, since the defendant has used the diesel purchased from the plaintiff in February, March and April 2000 for bunkering, the Customs Department had rejected the plaintiff's claim for reimbursement of subsidy. What is important to note is that the Customs Department in its letter to the plaintiff states that:

> subsidi tidak akan dibayar ke atas jualan diesel untuk kegunaan bunkering tempatan dan luar Negara.

[72] A reading of the above letter and the evidence of PW2 which remain unchallenged would tend to support the plaintiff's submission that the defendant has breached both terms of the agreement. Thus, the court finds that the plaintiff has succeeded in proving their case. The totality of the evidence shows that the sale during the material time period was agreed to be for commercial inland use by using the said diesel for bunkering, the defendant has breached its contract with the plaintiff. As a result of this breach, the plaintiff is entitled to claim damages for any losses which arose in the usual course of things. It is clear that the defendant used the oil for the purpose of bunkering.

Damages

[73] On the issue of damages, the Supreme Court in the case of *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 held that the consequences of a breach of contract are governed by s. 74 of the Contracts Act 1950.

[74] In the light of the evidence of PW2, the loss of reimbursement of subsidy of RM609,950.20 suffered by the plaintiff is clearly within the ambit of s. 74 of the Contracts Act because such loss naturally arose from the defendant's breach of both terms of the contract since the defendant has used the diesel for bunkering which preclude the plaintiff from getting the subsidy from the government or when the contract was made, the defendant knew it was for the purchase of diesel for commercial inland use, which is subsidized by the Government. In the circumstances, the plaintiff is entitled to claim for the sum of RM609,950.20 from the defendant.

Conclusion

[75] For the reasons stated above, I allow the plaintiff's claim for the sum of RM609,520.20 with interest at the rate of 8% per annum from the date of filing of the writ until the date of realisation with costs. As agreed between the parties the decision in this suit will bind D7 Suit.